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Appellate Docket
No. 629

In the

Supreme Court of the United States

October Term, 1962

ALFRED J. HAUSFELD,
Petitioner,

vs.

ROBERT N. ZIEGLER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM H. FRY
ROBERT M. DENNIS
RENDIGS, FRY, KIELY & DENNIS
907 Union Central Building
Cincinnati 2, Ohio
Attorneys for Respondent

ROBERT N. ZIEGLER
In Propria Persona
2213-16 Carew Tower
Cincinnati 2, Ohio

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OPINION BELOW

A written opinion was rendered by the Court of Appeals for the First Appellate District of Ohio and that opinion is set forth herein as Appendix "A".

ADDITIONAL PARTS OF THE RECORD

Respondent submits herewith the following additional portions of the record in the Courts below in the belief

that they are pertinent and of assistance in a review of this matter:

Appendix "B" – Respondent's "Motion to Strike Petition from the Files," filed in Hamilton County Common Pleas Court.

Appendix "C" – "Entry Granting Motion to Strike Petition from Files and Dismissing Action" in Hamilton County Common Pleas Court.

Appendix "D" – "Judgment of Affirmance" in the Court of Appeals, First Appellate District of Ohio.

Appendix "E" – Order of the Supreme Court of Ohio Overruling Petitioner's Motion to Certify.

Appendix "F" – Order of the Supreme Court of Ohio Denying Petitioner's Petition for Rehearing.

JURISDICTION

Petitioner does not present a jurisdictional question for the consideration of the Supreme Court of the United States for the reason that the same was not seasonably raised in the proceedings before the Supreme Court of Ohio in accordance with Ohio law and was first presented to the Supreme Court of Ohio on Petitioner's Petition for Rehearing, after a hearing had been had on Petitioner's Motion to Certify, and a final order entered by the Supreme Court of Ohio overruling the Motion to Certify.

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to consider a federal constitutional question

raised by the Petitioner for the first time in his Motion for Rehearing before the Supreme Court of Ohio, after hearing on Petitioner's Motion to Certify and Entry of a final order by the Supreme Court of Ohio?

2. Have any rights of the Petitioner, under the Constitution of the United States, been violated or denied where a petition filed by Petitioner in the State Court, seeking damages for alleged alienation of affection, is stricken from the files by the State Court, on motion of adverse party, asserting that the petition is a sham and vexatious pleading and states no cause of action against the defendant?

STATEMENT OF FACTS

Petitioner filed in the Common Pleas Court. Hamilton County, Ohio a petition against the Respondent for damages, alleging that Respondent had alienated the affections of the Petitioner's wife by advising her to neither sue for divorce nor reconcile with Petitioner until Petitioner had first submitted to psychiatric treatment. (Said petition in Common Pleas Court is attached to Petitioner's Petition for a Writ of Certiorari herein as Appendix "A" thereto.)

This Respondent filed in Common Pleas Court a "Motion to Strike Petition from the Files," which motion is set forth herein as Appendix "B". The basis of said motion are stated therein. Respondent contended that that petition was "a sham and vexatious pleading" which failed to state a cause of action, and was, therefore, subject to a Motion to Strike from the Files.

The Common Pleas Court, upon consideration of written memoranda and argument, found Respondent's motion well taken and granted same, and, inasmuch as Petitioner had indicated *his election not to plead further,*

the Court dismissed the action. The Court's entry is set forth herein as Appendix "C".

Petitioner took his appeal from that dismissal to the Court of Appeals for the First Appellate District of Ohio. That Court of Appeals found no error in the proceedings below and affirmed the judgment of the Court of Common Pleas. That judgment is set forth herein as Appendix "D" and the Opinion of that Court is set forth herein as Appendix "A".

Petitioner then filed in the Supreme Court of Ohio a Motion to Certify, and that Court, upon consideration of briefs and hearing of oral argument, overruled the motion. That order of the Ohio Supreme Court is set forth herein as Appendix "E".

Petitioner then filed in the Supreme Court of Ohio a Petition for Rehearing, which Petition that Court denied. That order of the Ohio Supreme Court is set forth herein as Appendix "F". It was in that Petition for Rehearing that the first mention was made by Petitioner of the existence of a federal constitutional question.

ARGUMENT

1. DOES THE SUPREME COURT OF THE UNITED STATES HAVE JURISDICTION TO CONSIDER A FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE PETITIONER FOR THE FIRST TIME IN HIS MOTION FOR REHEARING BEFORE THE SUPREME COURT OF OHIO?

Respondent submits that the Court does not have such jurisdiction. Under the Ohio law, constitutional questions which are not raised prior to hearing in the Supreme Court of Ohio are not considered seasonably raised and are deemed waived. *The Village of Clarington* v. *Althar,* 122

O.S. 608. Following the reasoning of that decision, the Petitioner should have raised the alleged federal constitutional question before the Court of Common Pleas. He did not object to the proceedings in the hearing on Respondent's motion nor did he at any time attack the validity of the Ohio law which permits a court to strike a pleading from the files.

Respondent submits that a federal constitutional question is not raised, as contended by Petitioner, merely by the existence of circumstances which counsel now asserts have, or might have, constitutional implications. It is not raised "sub silentio," as Petitioner contends, nor does it merely develop of its own volition. To "raise" or to "present" a constitutional question means just what the words imply — an active calling of the Court's attention to that question. It is clear that the first mention of the question occurred in Petitioner's Petition for Rehearing in the Ohio Supreme Court.

This Court has ruled many times on the question of whether the federal constitutional question was seasonably raised. *Brown* v. *Massachusetts*, 144 U.S. 573; *Hulbert* v. *Chicago*, 202 U.S. 275; *Edelman* v. *California*, 344 U.S. 357; *Bailey* v. *Anderson*, 326 U.S. 203.

With specific reference to a situation such as exists in the case at bar, this Court in the case of *Herndon* v. *Georgia*, 295 U.S. 441, stated:

> "3. An attempt to raise a federal question before a state Supreme Court upon a petition for rehearing after judgment is too late, unless that Court actually entertains the question and decides it."

2. HAVE ANY RIGHTS OF THE PETITIONER, UNDER THE CONSTITUTION OF THE UNITED STATES, BEEN VIOLATED OR DENIED WHERE A PETITION FILED BY PETITIONER IN THE STATE COURT, SEEKING DAMAGES FOR ALLEGED ALIENATION OF AFFECTION, IS STRICKEN FROM THE FILES BY THE STATE COURT, ON MOTION OF ADVERSE PARTY, ASSERTING THAT THE PETITION IS A SHAM AND VEXATIOUS PLEADING AND STATES NO CAUSE OF ACTION AGAINST THE DEFENDANT?

The question must be answered in the negative, for the following reasons:

(a) Ohio law provides for the procedure followed.

(b) Petitioner voluntarily elected not to plead further, thus resulting in dismissal of his action.

(c) Petitioner was afforded full hearing and review of the question.

(a) Ohio Revised Code, Sec. 2309.70, provides statutory authority for a motion to strike pleadings from the files. The propriety of such a pleading has long been recognized by the Ohio courts. In *Golay* v. *Zollinger*, 16 Abs. 387, the court states:

> "A trial court may, in its discretion, sustain a motion to strike from the files a pleading which is of such a character that there is not a semblance of a cause of action or defense stated therein, rather than relegate the movant to a similar remedy by demurrer."

In *Marting* v. *Graff*, 82 Abs. 202, affirmed by the Court of Appeals in 82 Abs. 212, the court states:

> "A petition which, stripped of conclusions of law, conclusions of the pleader and argumentative matter, contains no affirmative allegations of fact which might

> properly be directed to the relief sought therein, is a frivolous and vexatious pleading and on motion will be stricken from the files."

The Supreme Court of Ohio recognized the necessity of such a motion in *White* v. *Calhoun*, 82 O.S. 401:

> "1. The power of the court of common pleas to order stricken from the files an answer which is a sham answer, one which, although good in form, is false in fact and not pleaded in good faith, is a power existing at the common law, and is one of the powers inherent in the court to be exercised in due and speedy administration of justice."

That this well recognized procedure of striking a pleading from the files was properly invoked in the instant case is clear from a review of the pleading which was stricken. Applying the language of the court in the case of *Marting* v. *Graff, supra*, the petition, stripped of conclusions of law, conclusions of the pleader and argumentative matter, contains no affirmative allegations of fact which might properly be directed to the relief sought. Such was the ruling of the Court of Common Pleas.

(b) As indicated in the entry granting Respondent's motion (Appendix "C") the Petitioner elected to have the ruling on that motion have the effect of a final order. Petitioner might, on the other hand, have filed an amended petition in an attempt to state a cause of action and pursue the matter to determination on its merits. Therefore, if the ruling on Respondent's motion deprived Petitioner of a presentation of the evidence and determination of the merits, that deprivation resulted from his own election.

(c) As previously stated, Petitioner's contention regarding the subject pleading was considered by three courts in Ohio – the Court of Common Pleas, the Court of Appeals and the Supreme Court. In each instance the

Petitioner was afforded the opportunity of submitting written memorandum or brief and of oral argument. In each instance he availed himself of these opportunities.

CONCLUSION

Petitioner has deprived this Court of jurisdiction in this matter by failing to raise his alleged federal constitutional question in a timely fashion in the courts below.

Even if jurisdiction were to be taken, the history of the case, seen in the light of Ohio law, indicates that no rights of Petitioner under the Constitution of the United States have been violated or denied.

The argument of counsel for Petitioner implies — if, indeed, it does not categorically assert — that every plaintiff whose case has been dismissed upon motion striking his pleading for reasons good and sufficient under state law and procedure (and the same would have to be said of a demurrer or similar pleading) has been denied due process under the Federal Constitution. The mere statement of such a proposition is sufficient to demonstrate its fallacy and repugnance to sound and accepted jurisprudence.

Respectfully submitted,

WILLIAM H. FRY
ROBERT M. DENNIS
RENDIGS, FRY, KIELY & DENNIS
907 Union Central Building
Cincinnati 2, Ohio
Attorneys for Respondent

ROBERT N. ZIEGLER
In Propria Persona
2213-16 Carew Tower
Cincinnati 2, Ohio

APPENDIX "A"

OPINION OF THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

(March 26, 1962.)

Hamilton County, No. 9053

PER CURIAM.

An examination of the record discloses no error, prejudicial to the rights of Appellant. The judgment of the Court of Common Pleas, Hamilton County, Ohio is, therefore, affirmed.

LONG, P. J., HILDEBRANT and KEEFE, J. J., concur.

APPENDIX "B"

MOTION TO STRIKE PETITION FROM THE FILES IN THE COMMON PLEAS COURT, HAMILTON COUNTY, OHIO

No. A-183100

Now comes the defendant in propria persona, and by his counsel, and moves the Court to strike the petition herein from the files, as a sham and vexatious pleading, for the following reasons:

1. That on the face of the petition, it is obvious that the petition does not state the semblance of a cause of

action, inasmuch as the allegations therein indicate no more than the fact that defendant, as an attorney, was complying with his duty in advising his client with reference to marital matters, and was suggesting medical counseling and services with respect to the marital relationship.

2. That the petition does not allege — nor under the circumstances pleaded could it be alleged — that any professional relationship existed between plaintiff and the defendant, which professional relationship is essential to the existence of a cause of action based upon improper advice given by an attorney.

3. That from the face of the petition, it was an improper act for the same to have been filed in this Court, the filing thereof by counsel for plaintiff being a violation of the Canons of Ethics of the legal profession, which Canons impose responsibility upon the attorney — as distinguished from his client — for the bringing of unjustifiable litigation, the effect of which is merely to harass or injure the opposite party or to work oppression or wrong.

ROBERT N. ZIEGLER (s)
Robert N. Ziegler,
In propria persona

RENDIGS, FRY & KIELY
By WILLIAM H. FRY (s)
William H. Fry
Attorneys for Defendant

APPENDIX "C"

ENTRY GRANTING MOTION TO STRIKE PETITION FROM FILES AND DISMISSING ACTION IN HAMILTON COUNTY COMMON PLEAS COURT

No. A-183100

This cause came on to be heard on the Motion of the defendant, in propria persona, and by his counsel, to strike the Petition of the plaintiff in this cause from the files herein, the matter having been presented to the Court in argument by counsel for plaintiff and counsel for defendant; and the Court being advised in the premises and finding the Motion to be well taken, hereby orders that the same be and it is now granted, and the Petition of plaintiff in this cause is hereby ordered stricken and is stricken from the files herein.

Plaintiff not desiring to plead further in this cause, the same is hereby dismissed, and final judgment is hereby entered in favor of defendant, at plaintiff's cost.

An exception to the ruling of the Court is reserved to the plaintiff.

.....
Judge

MELVIN SCHAENGOLD (s)
Attorney for Plaintiff

RENDIGS, FRY & KIELY
By WILLIAM H. FRY (s)
William H. Fry
Attorneys for Defendant

APPENDIX "D"

JUDGMENT OF AFFIRMANCE IN THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO

No. 9053

This cause came on for hearing upon the appeal on questions of law, assignments of error, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the appellee recover from the appellant his costs herein expended taxed at $.....

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio for execution upon this judgment.

To all of which appellant, by his counsel, excepts.

.....

MELVIN SCHAENGOLD (s)
Melvin Schaengold
Attorney for Plaintiff-Appellant

ROBERT N. ZIEGLER (s)
Robert N. Ziegler
In Propria Persona

RENDIGS, FRY & KIELY
By WILLIAM H. FRY (s)
William H. Fry
Attorneys for Defendant-Appellee

APPENDIX "E"

ORDER OF THE SUPREME COURT OF OHIO OVERRULING PETITIONER'S MOTION TO CERTIFY

(Thursday, July 5, 1962.)

No. 37524

It is ordered by the Court that this motion is overruled.

APPENDIX "F"

ORDER OF THE SUPREME COURT OF OHIO DENYING PETITIONER'S PETITION FOR REHEARING

(Wednesday, October 3, 1962.)

No. 37524

It is ordered by the Court that rehearing in this case is denied.